

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 CS Wrongful Death of a Viable Fetus
SPONSOR(S): Llorente and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2538

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>4 Y, 0 N, w/CS</u>	<u>Billmeier</u>	<u>Billmeier</u>
2) <u>Judiciary Committee</u>	<u></u>	<u>Thomas</u>	<u>Hogge</u>
3) <u>Justice Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

HB 839 creates a new section of law in chapter 768, F.S., relating to negligence. It provides that when a pregnancy is wrongfully ended by negligence, a mother or father of a fetus may bring an action for negligent infliction of emotional distress, irrespective of physical impact. Current law often prohibits recovery for negligent infliction of emotional distress absent physical impact.

The cause of action created by this bill allows each parent to recover for mental pain and suffering, emotional distress, and any economic damages relating to the pregnancy. This bill provides that a parent may recover:

- Medical expenses arising out of the pregnancy;
- Damages for mental pain and suffering, including compensation for the lost hopes, dreams, and expectations for what life might have been like had the pregnancy resulted in a live birth. In evaluating damages for mental pain and suffering, the trier of fact may consider the characteristics of the unborn fetus including the sex and name chosen and circumstances surrounding the loss of the pregnancy.

This bill provides that neither parent may bring the cause of action against the other parent and provides that a pregnant woman may not be sued for termination of her own pregnancy. This bill further provides that a health care provider may not be sued for nonnegligent termination of a pregnancy under the applicable standard of care when the appropriate consent was obtained.

The fiscal impact of this bill is uncertain. See "Fiscal Comments."

This bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – This bill creates a new civil cause of action under the negligence statute.

Promote personal responsibility – This bill imposes new liability on persons who negligently end another's pregnancy.

B. EFFECT OF PROPOSED CHANGES:

HB 839 creates a new section in chapter 768, Florida Statutes, relating to negligence. This bill provides that when a pregnancy is wrongfully ended by negligence, a mother or father of a fetus may bring an action for negligent infliction of emotional distress, irrespective of physical impact.

The "Impact" Rule in Florida Tort Law

Current law generally prohibits recovery for negligent infliction of emotional distress absent physical impact. In Tanner v. Hartog,¹ the Florida Supreme Court explained the impact rule in Florida:

Generally stated, the impact rule requires that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional stress must flow from physical injuries sustained in an impact.

Tanner held that expectant parents could recover for "negligent stillbirth" when the negligence of a physician caused the fetus to be stillborn. In Tanner, the court created a "narrow" exception to the impact rule.² The court left it to the courts to define other cases where the impact rule might not be applicable:

We today modify to a limited extent our previous holdings on the impact doctrine. In doing so, however, we are unable to establish a rigid hard and fast rule that would set the parameters for recovery for psychic trauma in every case that may arise. The outer limits of this cause of action will be established by the courts of this state in the traditional manner of the common law on a case-by-case basis.³

The Florida Supreme Court recently explained the purpose of the impact rule:

The impact rule has been traditionally applied primarily as a limitation to assure a tangible validity of claims for emotional or psychological harm. Florida jurisprudence has generally reasoned that such assurance is necessary because, unlike physical injury, emotional harm may not readily align with traditional tort law damage principles. Our courts have explained that the existence of emotional harm is difficult to prove, resultant damages are not easily quantified, and the precise cause of such injury can be elusive. This Court has also theorized that without the impact rule, Florida courts may be inundated with litigation based solely on psychological injury.⁴

However, Chief Justice Pariente has argued that the impact rule should be abolished:

¹ 696 So.2d 705, 707 (Fla. 1997).

² Id. at 708.

³ Id. at 708 n. 5 (quoting Champion v. Gray, 478 So.2d 17, 21-22 (Fla. 1985)(Alderman, J., concurring specially)).

⁴ Rowell v. Holt, 850 So.2d 474, 478 (Fla. 2003)(citations omitted).

In my view, the impact rule reflects an outmoded skepticism for damages resulting from mental injuries. As best summarized by the Illinois Supreme Court:

The requirement [of physical manifestation of emotional distress] is overinclusive because it permits recovery for mental anguish when the suffering accompanies or results in any physical impairment, regardless of how trivial the injury. More importantly, the requirement is underinclusive because it arbitrarily denies court access to persons with valid claims they could prove if permitted to do so.

Additionally, the requirement is defective because it "encourages extravagant pleading and distorted testimony." To continue requiring proof of physical injury when mental suffering may be equally recognizable standing alone would force "victim[s] to exaggerate symptoms of sick headaches, nausea, insomnia, etc., to make out a technical basis of bodily injury upon which to predicate a parasitic recovery for the more grievous disturbance, the mental and emotional distress she endured."

Corgan v. Muehling, 143 Ill.2d 296, 158 Ill.Dec. 489, 574 N.E.2d 602, 608 (1991) (quoting St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 652 (Tex.1987)) (citations omitted).

I believe that the traditional foreseeability analysis applicable to negligence claims is the more appropriate framework for a limitation on tort recovery in this State.⁵

In Thomas v. OB/GYN Specialists of the Palm Beaches,⁶ the Fourth District Court of Appeal held that medical malpractice leading to the death of a fetus of fifteen to eighteen weeks gestation was not a "wrongful stillbirth" under Tanner. This bill would permit a cause of action in cases such as Thomas.

This bill would abolish the impact rule in causes of action for negligent infliction of emotional distress when a pregnancy is wrongfully ended by negligence.

Damages Recoverable Under HB 839

The cause of action created by this bill allows each parent to recover for mental pain and suffering, emotional distress, and any economic damages relating to the pregnancy. This bill provides that a parent may recover:

- Medical expenses arising out of the pregnancy;
- Mental pain and suffering, including compensation for the lost hopes, dreams, and expectations for what life might have been like had the pregnancy resulted in a live birth. In evaluating damages for mental pain and suffering, the trier of fact may consider the characteristics of the unborn fetus including the sex and name chosen⁷ and circumstances surrounding the loss of the pregnancy.

By way of comparison, the Florida Wrongful Death Act, section 768.21, F.S., specifies the damages that may be recovered for wrongful death:

⁵ Gracey v. Eaker, 837 So.2d 348, 359 (Fla. 2002)(Pariente, J., concurring).

⁶ 889 So.2d 971 (Fla. 4th DCA 2004).

⁷ In Kammer v. Hurley, 765 So.2d 975 (Fla. 4th DCA 2000), the Fourth District Court of Appeal allowed the plaintiffs to present evidence of the name chosen for their unborn son. The dissent argued this was improper under Tanner. This bill would allow such evidence in appropriate situations.

(1) Each survivor⁸ may recover the value of lost support and services⁹ from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value;¹⁰

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury;¹¹

(3) Minor children¹² of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury;¹³

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors;¹⁴

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them;¹⁵

The decedent's personal representative may recover for loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest for the decedent's estate.¹⁶

Exceptions to the Cause of Action Created by HB 839

This bill provides that neither parent may bring this cause of action against the other parent and provides that a pregnant woman may not be sued for termination of her own pregnancy. This bill further provides that a health care provider may not be sued for nonnegligent termination of a pregnancy under the applicable standard of care when the appropriate consent was obtained.

This bill takes effect upon becoming a law.

C. SECTION DIRECTORY:

Section 1. Creates s. 768.38, F.S., to create a cause of action for negligent infliction of emotional distress, irrespective of physical impact, for ending a pregnancy by negligence.

Section 2. Provides an effective date of upon becoming law.

⁸ "Survivor" means "the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support." s. 768.18(1), F.S.

⁹ "Support" includes contributions in kind as well as money. s. 768.18(3), F.S. "Services" means "tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent." s. 768.18(4), F.S.

¹⁰ Section 768.21(1), F.S.

¹¹ Section 768.21(2), F.S.

¹² "Minor children" is defined as "children under 25 years of age, notwithstanding the age of majority." s. 768.18(2), F.S.

¹³ Section 768.21(3), F.S.

¹⁴ Section 768.21(4), F.S.

¹⁵ Section 768.21(5), F.S.

¹⁶ Section 768.21(6), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See "Fiscal Comments."

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See "Fiscal Comments."

2. Expenditures:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See "Fiscal Comments."

D. FISCAL COMMENTS:

The fiscal impact of this bill is not known. This bill would create a new cause of action. The number of actions that will be brought under this bill cannot be determined.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Civil Justice Committee considered the bill on March 16, 2005, and adopted a "strike everything" amendment that narrowed the cause of action from wrongful death of a viable fetus to the cause of action for negligent infliction of emotional distress. This analysis is drawn to the committee substitute.